In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

C. M. BAIR,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking corporation),
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit appears in full in the record (R. 112-117), and has been reported in *Bair v. Bank of America National Trust & Savings Association* (C.C.A., 9th Cir.), 112 Fed. (2d) 247.

The opinion of the district court likewise appears in the record (R. 75-79); it has not been reported elsewhere.

II.

JURISDICTION OF THE SUPREME COURT.

The basis upon which this Court's jurisdiction is invoked is already set out in the accompanying petition under subdivision B.

III.

STATEMENT OF CASE.

The essential facts of the case have been fully stated in the accompanying petition under subdivision A, II. No repetition will be indulged here. Any additional facts which may become pertinent in the course of the argument made below will be specifically noted there.

IV.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in holding and deciding that under Rule 69(a), *Federal Rules of Civil Procedure,* a judgment creditor may proceed upon the authority of the state practice and procedure to examine the judgment debtor, yet depart substantially

and in effect entirely from the plain requirements of the state statutes invoked and the plain holdings of the state court of last resort, which are applicable.

V.

SUMMARY OF ARGUMENT.

The petitioner contends:

(1) That Rule 69(a) requires the same substantial compliance with the state practice and procedure, when invoked, as though the proceedings were taken in the state court.

(2) That the state practice in Montana here in question is neither relaxed nor modified by federal statute or rule of procedure.

(3) But that the order for the petitioner's examination departs wholly and substantially from the Montana state practice and procedure:

(a) In that Section 9454, *Revised Codes of Montana,* 1935 (App., p. i), invoked below, requires the order for examination itself to specify a time and place for examination in the county of the debtor's residence. Yet the order challenged here permits the referee to fix times and places indiscriminately through out the whole state of Montana in his discretion. For this error specified and argued below the Court of Appeals should have reversed.

(b) In that Sections 9374-9376, *Revised Codes of Montana,* 1935 (App., pp. ii-iii), defining the state

practice afford an opportunity, before a referee may be named by the court, for a judgment debtor to consent to or agree upon some fit person as such. Failing to secure such consent or agreement the judge may then designate, but only a resident of the county where the proceeding is triable. This state practice was wholly disregarded. For this error specified and argued below the Court of Appeals should have reversed.

(c) In that Sections 9454 and 9458, *Revised Codes of Montana,* 1935 (App., pp. i, ii), do not authorize the examination of third persons indiscriminately throughout the state of Montana short of compliance, in addition, with Section 9457 of the same codes (App., p. i), which controls the examination of those suspected of concealing the debtor's assets, etc. This state practice was also wholly disregarded. For this error specified and argued below the Court of Appeals should have reversed.

To the contrary the Circuit Court of Appeals erroneously held, in substance,

(a) That under Section 9454, *Revised Codes of Montana,* 1935 (App., p. i), the federal district court need not itself fix a time and place for the debtor's examination within the county of his residence, but may empower the referee designated to fix times and places indiscriminately in his discretion throughout the entire state of Montana.

(b) That the referee authorized by Section 9454, of the state codes need not be appointed or qualified

under the state practice and procedure nor in accord with the state statutes, but perforce of Rule 53, *Federal Rules of Civil Procedure.*

(c) That persons other than the judgment debtor may be examined generally in any county of the State of Montana as witnesses under Section 9458, *Revised Codes of Montana,* 1935 (App., p. ii), without compliance at all with Section 9457, of the same codes (App., p. i), controlling in the state practice the examination of third parties.

VI.

ARGUMENT.

FOREWORD.

The petitioner's argument will present his contentions in the order of their statement in the petition. Rule 69(a) mentioned appears *in litteris* in the appendix (App., p. iii); there the pertinent portions have been italicized.

(1) WHEN THE STATE PRACTICE AND PROCEDURE IS CHOSEN THE STATE STATUTES AND DECISIONS CONTROL.

It has been the uniform rule of the federal courts that where a federal statute or rule of court adopts a state rule of practice or procedure, whether appearing in the state statutes or written in the decisions of the state court of last resort, the construction given by the highest state courts governs. Specifically, such

has been the practice in the federal courts where the state procedure has been adopted in supplementary proceedings, particularly under Section 727, Title 28, *United States Code,* which preceded Rule 69(a) now in force.

See:

Atlantic etc. Co. v. Hopkins, 94 U.S. 11, 24 L. ed. 48;

McCracken v. Hayward, 2 How. 608, 11 L. ed. 397;

Supervisors of Carroll County v. United States, 18 Wall. 71, 21 L. ed. 771;

Sowles v. Witters (C.C., Vt.), 55 Fed. 159;

Johnson v. Crawford & Yothers (C.C., Pa.), 154 Fed. 761;

3 *Moore's Fed. Prac.* 3368-3371, sec. 69.02, and citations in footnotes.

A fair reading of Rule 69(a) accords with the holding of these authorities. They are, moreover, in full accord with the spirit and the letter of the decision of this Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L. ed. 1188, 58 Sup. Ct. Rep. 817. Particularly, the contentions of the petitioner accord with the latest pronouncement of this Court in the *Tompkins* case that the law of a state is found in (1) the statutes of the state, and (2) the decisions of its court of last resort.

Compare *Matos v. Hermanos,* 300 U.S. 429, 81 L. ed. 728, 57 Sup. Ct. Rep. 529, where pat comment is made by this Bench upon the impropriety inhering in the

construction by a federal court of a state statute which is at variance with the interpretation placed thereon by the courts of the state.

The respondent has elected to examine the petitioner in accordance with the state practice and procedure; it follows that it is bound to follow the state statutes and decisions, unless within the limits of Rule 69(a) an applicable statute of the United States governs.

(2) THERE IS NO APPLICABLE STATUTE OF THE UNITED STATES WHICH IS CONTROLLING HERE.

No federal statute within the exception made by Rule 69(a) has been relied upon by either the district court (R. 75-79) or the Court of Appeals (R. 112-117). None has been suggested by counsel for the respondents.

Rule 53, *Federal Rules of Civil Procedure,* governing references ~~in~~ the federal practice has been noted (R. 79; 116) as justification for the procedure followed in the appointment of the referee (R. 39). But there has been no hint that in this federal rule was to be found any authority for the construction placed upon Section 9454 of the state codes and its companion Sections 9457 and 9458.

Speaking of these Montana statutes the opinion of the Court of Appeals is explicit (R. 114):

> "Ample authority is found in these statutes and in the rule (Rule 69(a)) for the order appealed from, and for the steps taken by the referee thereunder" (interpolation ours).

So, too, the district court said (R. 76):

> "* * * The plaintiff has elected to proceed in accordance with the practice and procedure of the state, and the first remedy therein provided * * *".

Again (R. 77):

> "* * * It seems to the Court under the facts presented here that the judgment creditor has selected remedies provided by the state statute in Sections 9454 and 9458 that are ample and sufficient for the purposes intended."

It follows upon the record at bar (a) that no applicable federal statute governs the proceedings here challenged, (b) that no governing federal statute is relied upon in either court below as the foundation for their decisions, and (c) that there is in truth no applicable federal statute at all.

There is presented solely the meaning of the state statutes as interpreted by the Supreme Court of the state of Montana.

(3) THE ORDER CHALLENGED (R. 37-40) IS A COMPLETE DEPARTURE FROM THE STATE PRACTICE AND PROCEDURE:

(a) In that it disregards the requirements of Section 9454 of the state codes (App., p. i) that therein there be specified a time and place of examination in the county of the debtor's residence.

This departure is conceded in both opinions below (R. 79; 115). In the district court the omission is justified by reliance upon Rule 53(d)(1) of the federal rules. But here it is the federal and not the state

practice to which resort is had in the very teeth of the plain language of Rule 69(a).

Hence, apparently the Circuit Court of Appeals shifts to interpretation of the state statutes buttressed by analogy only to the federal rules and to an old decision of a New York trial court reported as *Redmond v. Goldsmith* (1879), 2 N.Y. Monthly Law Bulletin 19 (R. 115) affirming the Court of Appeals grounds upon "substantial compliance with the statute where the time and place are fixed by the referee's order in conformity with the law" (R. 115).

But neither the reason advanced in the district court nor the analogy found pertinent in the Court of Appeals is the law of the state. We join issue sharply upon the statement in the last opinion below that "no local decisions bearing immediately upon the subject are cited, * * *" (R. 115).

There and as well in the court of first instance counsel for the petitioner cited and relied upon the decision of the Montana Supreme Court in *In re Downey,* 31 Mont. 441, 78 Pac. 772, where it is written of what is now Section 9454 of the *Montana Codes* (31 Mont. 445):

> "* * * The court must look to it (Section 9454) for authority, and should make no order nor *adopt a course of procedure not authorized by it* * * *" (italics and interpolation supplied).

Such is the law of the state governing the practice in the state courts under Section 9454 to this day.

That statute plainly authorizes only an order specifying for his examination a time and place in the county of the petitioner's residence. That statute does not authorize an order, as at bar, delegating to a referee the power to select successive times and places for examination indiscriminately as he may choose throughout all the fifty-six counties of the state.

On order under Section 9454, as interpreted by the Montana Supreme Court in the *Downey* case, for an examination of the petitioner at a time and place specified therein in Meagher County, Montana, where he resides (R. 36), is the only order known to the practice of the state. That practice as delineated in the statute and decision cited does not countenance the order here challenged nor the consistent interpretation thereof by the referee in his further directions (R. 42-44) for examinations beginning with the petitioner and certain others in Meagher County, Montana, on a day certain (R. 42-43), and continuing to Musselshell County, Montana (R. 43), and thereafter to Yellowstone County, Montana (R. 43-44), on successive days.

That is, Section 9454 of the state practice, which is in question, does not sustain in any particular any of these orders. The district court expressly concedes as much (R. 79); the Court of Appeals, by implication (R. 115). Both justify by resort to a practice not that of the state: the district court, by the citation of Rule 53(d)(1) of the federal rules (R. 79); the Court of Appeals by the added analogy of what is assumed to be the ancient New York practice (R. 115).

It is clear (a) that in the particulars here assailed the challenged order departs entirely from the state practice, (b) that thereby in effect Rule 69(a) of the federal rules is amended to read, in conclusion, "in the manner provided by the practice of the state in which the district court is held, but only in so far as the district court shall choose", and (c) that the departure from the state practice is expressly admitted, the amendment of the federal rules certainly established.

(b) In that the referee designated was appointed in complete disregard of the state practice and procedure.

Sections 9374, 9375 and 9376, *Revised Codes of Montana,* 1935 (App., pp. ii-iii) govern the state practice and procedure in the appointment of a referee under Section 9454. Specifically, these statutes afford the judgment debtor an opportunity to consent to some suitable referee before an appointment may be made on the motion of the adversary party. Even then the appointee must be a resident of the county where the proceeding is triable, viz.: in this case, of the county of the petitioner's residence, where under Section 9454 his examination must be held.

There is no dissent from this exposition of the state practice, as we read the opinions below (R. 75-79; 112-117) and interpret the argument of opposing counsel. Rather at this point the shift is to Rule 53, *Federal Rules of Civil Procedure* (R. 116), where provision is made in the federal practice for the appointment of a master or referee.

But the procedure there detailed is not the practice of the state which the alternative chosen under Rule 69(a) offers. Moreover, the state practice act is complete in its provision for the designation, qualification and functioning of a referee.

The need is not that under Section 9454 of the state codes a referee must be appointed in some way. Rather under Rule 69(a) the choice given of the state practice and procedure definitely defining how the appointment shall be made has been accepted by the respondent.

That practice provided (1) for the examination of the judgment debtor under Section 9454 before a referee, (2) appointed, likewise consistent with the state practice, under Sections 9374, 9375 and 9376 of the state codes. There is not hiatus.

That is, there is no room for resort to the federal practice in the appointment of a referee; the state procedure precisely points out here the course delimited by the state law. That state procedure applies in its entirety certainly, or not at all. Certainly Rule 69(a) does not suggest a course in part the practice of the state, in part something wholly different.

The resort in such circumstances to the federal rules is a complete and undenied departure from the state practice. It is at the same time an inexcusable violation of Rule 69(a) itself, which in so far as this record goes makes the practice of the state the rule of decision, says nothing of the federal practice at all.

Counsel for the petitioner appreciate that the departures here assailed, erroneous though they be, alone furnish no basis for granting the writ prayed for. Cumulated as they are, however, with the other vices inhering in the challenged order, there is indicated a studied purpose to sustain an asserted right below in effect to amend at pleasure the rules of procedure promulgated by this Court. In this rests the basis for the exercise of the discretionary jurisdiction of the Supreme Court for the reasons outlined in the foregoing petition.

(c) In that Sections 9454 and 9458, Revised Codes of Montana, 1935 (App., pp. i, ii) do not authorize the examination of third persons indiscriminately throughout the state short of compliance with Section 9457 not here in question.

Stemming from the authority vested in him to conduct hearings in any county of the state (R. 39), the referee has asserted the power to examine without the county of the petitioner's residence other persons, so-called witnesses, at successive times and places (R. 43-44). If *witnesses* these persons be, then under Section 9454 their examination as such properly belongs in the county where the petitioner resides and himself must be examined.

For such is again the plain language of Section 9454; opposing counsel and the courts below disclaim an appeal elsewhere (R. 78-79, 113-114). The affidavit which initiated these proceedings (R. 33-36) is drawn to satisfy the demands of Section 9454, meets none of the requirements of Section 9457 (App. pp.

i-ii), which alone designs a remedy to reach the debtor's assets in the hands of others.

In truth, the real purpose of the respondent's counsel is not concealed at all by the lip service paid by them to Sections 9454 and 9458. They propose to examine others than the judgment debtor without limit or restriction, all of which is unmistakably evidenced first by the inexcusable language of the order of reference (R. 39-40), and secondly by the equally unbounded interpretation which the referee has placed thereon by his own order (R. 42-44) and his subpoenas issued thereunder (R. 48-49, 51-52).

Disclosures such as this order and these subpoenas contemplate, calling as they do for the records, accounts and business transactions of others than the judgment debtor, had by them with others than him, lie certainly beyond the utmost limits of Rule 69(a) or Sections 9454, 9458 of the state codes. Such is the express holding, even under the federal rule in question, of the district court in *Burak v. Scott* (D. C., D. Col.), 29 Fed. Sup. 775.

But here it is the state practice in Montana which governs the proceedings in question. The state practice is plain, indeed. The case at bar the more aggravated.

Both Sections 9454 and 9457 are statutory substitutes for the creditor's bill of the old equity practice. Such has been held in

In re Downey, 31 Mont. 441, 78 Pac. 772;

Missoula Trust & Savings Bank v. Northwestern Abstract & Title Assurance Co., 61 Mont. 370, 203 Pac. 854.

Precisely as a creditor's bill in equity requires a foundation in fact to authorize the discovery prayed, so within the rule of these decisions in Montana there must be of record a showing by affidavit, or otherwise, sufficient in substance to satisfy the predicate of the statute invoked. Else the examination contemplated by that statute fails.

Conversely, an order of the judge which without the requisite foundation in fact undertakes indirectly to set afoot an examination such as Section 9457 alone contemplates is not only erroneous in the state practice; it should be wholly void. Whatever may be the rule elsewhere it is entirely clear that the statutes of the state of Montana authorize no "fishing expedition". To this extent perhaps they have not yet been liberalized; they are, nevertheless, the rule of decision here.

It is not denied that in the state practice and consistent with the state statutes as in the old equity practice an examination into the affairs of others than the judgment debtor may not be had unless the factual basis required by Section 9457 first be laid.

Compare

Huntington v. Saunders, et al., 120 U. S. 78, 30 L. ed. 580.

Moreover, this undenied distinction in the state practice between an examination of the judgment debtor under Section 9454 and of third persons under Section 9457 makes for the certain condemnation of the effort launched at bar to interrogate witnesses indiscriminately by authority of Section 9458. This latter section may not be used as a convenient device for avoiding the factual requirements of Section 9457. The courts below, as we have pointed out many times heretofore, disclaim any purpose to authorize any such result. The record is abundant proof, however, that just such a result has been accomplished.

It is idle to speak on this record of an examination of the judgment debtor under Section 9454, while discussing the examinations proposed for third persons elsewhere than in the county of the debtor's residence and independently of the examination of the debtor himself.

The order challenged is, in truth, an unblushing attempt to accomplish in the name of the state practice what that practice in Montana emphatically forbids. The examination of the judgment debtor himself is subordinated to the inquisition directed at others. An order prayed under color of Section 9454 is fashioned into a weapon which the Montana practice designs only after compliance with Section 9457.

VII.

CONCLUSION.

In reaching its erroneous conclusions as demonstrated above the Court of Appeals has plainly decided important questions of local law by construing Section 9454 and its companion sections in the Montana codes, and has done so certainly in conflict with the applicable decision of the Montana Supreme Court in the *Downey* case cited. By its affirmance of the orders of the district court the Court of Appeals has sanctioned so flagrant a departure from the accepted and usual course of judicial proceedings, plainly defined as that course is in the statutes of the state and the decisions of its Supreme Court, as to call for an exercise of the power of supervision of this Court.

Else again, the decision in the *Tompkins* case is blunted, there is once more a turning back to the repudiated doctrine of *Swift v. Tyson.*

There is, moreover, implicit in the rulings below an important question of federal law. The pertinent portion of Rule 69(a) of the federal rules specifies with particularity that the petitioner's examination shall be conducted "in the manner provided by the practice of the state in which the district court is held".

May a district court then, when the state procedure is invoked, depart so thoroughly and substantially from the state practice that the course adopted is unrecognizable? Whatever answer is returned, we respectfully submit, the question of federal law involved is of extreme importance.

For the right asserted is in truth the right judicially to amend the rules promulgated by this Court to govern civil procedings in the district courts. A question of this magnitude should be settled here where the rules themselves have their origin.

Accordingly, a writ of certiorari out of this Court is prayed to review the judgment and decision below of the Circuit Court of Appeals for the Ninth Circuit.

Dated, August 16, 1940.

HORACE S. DAVIS,
STERLING M. WOOD,
Counsel for Petitioner.

(Appendix Follows.)